

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES,  
  
Plaintiff,  
  
v.  
  
ANSELMO RAIGOSA-GARCIA,  
  
Defendant.

No. CR-03-2119-FVS

ORDER DENYING MOTION TO  
VACATE

**BEFORE THE COURT** is the Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (Ct. Rec. 52). The Defendant is proceeding *pro se*. The Government is represented by Assistant United States Attorney Jill Bolton.

**BACKGROUND**

On September 5, 2003, the Defendant pleaded guilty to the offense of being an alien in the United States after deportation. (Ct. Rec. 13). During the Defendant's change of plea hearing, the Court told the Defendant it would consider but not necessarily follow the sentencing guidelines. (Ct. Rec. 40, at 6-10). The Court further informed the Defendant that the maximum sentence for his crime was 20 years in prison. *Id.* The Defendant stated on the record that he understood the consequences of pleading guilty. *Id.*

On January 15, 2004, the Court sentenced the Defendant to 57

1 months in prison and three years of supervised release. (Ct. Rec.  
2 29). The Court rejected the Defendant's motion for downward  
3 departure based on cultural assimilation. In doing so, the Court  
4 noted that the Defendant's criminal history included a pattern of  
5 unlawfulness that included three drunken driving offenses, some drug  
6 offenses and a 1997 domestic violence conviction in which he  
7 threatened to kill someone's children. The Court characterized the  
8 Defendant's criminal history as an "assaultive nature."

9 In a letter to the Court dated six days after his sentencing  
10 hearing, the Defendant said he wanted to withdraw his guilty plea  
11 because he did not know how severe his sentence would be. Shortly  
12 thereafter, the Defendant appealed his conviction and the Ninth  
13 Circuit affirmed. (Ct. Rec. 51).

14 On July 25, 2005, the Defendant filed this motion, claiming he  
15 received ineffective assistance of counsel. Specifically, the  
16 Defendant claims that (1) Ms. Pennell, his first attorney, and Mr.  
17 Umuolo, an attorney who took Ms. Pennell's place, failed to advise  
18 the Defendant of the specific consequences of his guilty plea, and  
19 (2) Mr. Umuolo failed to investigate his criminal history and  
20 challenge the pre-sentence report's mention of domestic violence.

## 21 **DISCUSSION**

22 In reviewing a claim of ineffective assistance of counsel, the  
23 Court applies a two-part test: "First, the defendant must show that  
24 counsel's performance was deficient. Second, the defendant must show  
25 that the deficient performance prejudiced the defense." *United*  
26 *States v. Recio*, 371 F.3d 1093, 1109 (9th Cir. 2004) (quoting

1 *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80  
2 L.Ed.2d 674 (1984)). Under the first element, the Court must examine  
3 "whether counsel's assistance was reasonable considering all the  
4 circumstances." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. This  
5 requires the Court to analyze counsel's performance with some  
6 deference, as "counsel is strongly presumed to have rendered adequate  
7 assistance and made all significant decisions in the exercise of  
8 reasonable professional judgment." *Id.* at 690, 104 S.Ct. 2052.  
9 Counsel's performance is not ineffective unless it fails to meet an  
10 objective standard of reasonableness under prevailing professional  
11 norms. *Id.* at 688, 104 S.Ct. 2052.

12 **A. Allegations that Counsel Failed to Advise**

13 The Court notes the Defendant does not assert he had a viable  
14 defense that he gave up by pleading guilty. Rather, he simply  
15 accuses his counsel of failing to offer a plausible alternative  
16 defense. Furthermore, even if the Defendant's claims regarding his  
17 counsel's failure to advise him of the possible sentence he was  
18 facing were true, there is nothing in the record to suggest the  
19 Defendant suffered prejudice. Although the Defendant alleges his  
20 counsel never informed him of the maximum statutory penalty he faced  
21 upon conviction, the Court informed the Defendant during his change  
22 of plea hearing that he was facing a maximum possible sentence of 20  
23 years. (Ct. Rec. 40, at 6-10).

24 **B. Allegations that Counsel Failed to Investigate Criminal  
25 History**

26 The Defendant contends that during the sentencing hearing, Mr.  
Umuolo did not distinguish for the Court the Defendant's felonies and

1 misdemeanor offenses so that the Court would only consider his  
2 felonies. Contrary to that assertion, a transcript of the sentencing  
3 hearing shows Mr. Umuolo separated the two types of offenses by  
4 telling the Court that the Defendant had only two felonies and the  
5 rest of his criminal history consisted of misdemeanors. (Ct. Rec. 41,  
6 at 10).

7 The Defendant also contends his counsel should have challenged  
8 the domestic violence information about him in the pre-sentence  
9 report. Assuming the truth of the Defendant's claims, the Defendant  
10 cannot show that a reasonable probability existed that, but for  
11 counsel's purported errors, the outcome of the proceeding would have  
12 been different. See *United States v. Labrada-Bustamente*, No. 04-  
13 30082, 2005 WL 3005792 at \*3 (9th Cir. Nov. 10, 2005) (assuming  
14 counsel was deficient by failing to object to a pre-sentence report,  
15 petitioner cannot show the sentencing proceeding would have been  
16 different). The Defendant contends that, but for the domestic  
17 violence asserted in the pre-sentence report, his sentence would have  
18 been lighter. However, the Court's decision to deny the Defendant's  
19 motion for a downward departure is a discretionary decision.  
20 Further, the Court cited two reasons for declining to grant the  
21 downward departure for cultural assimilation. (Ct. Rec. 54-2, at 20-  
22 21). Besides his history of violence, the Court also relied on the  
23 Defendant's overall pattern of criminal conduct, including drunken  
24 driving and drug offenses. (Ct. Rec. 54-2, at 20-21). Given the  
25 Court's dual reasons for failing to grant a downward departure, the  
26 Defendant's contentions fall short of proving the Court would have

1 sentenced him to a lighter term had the domestic violence references  
2 not been included in the pre-sentence report.

3 **CONCLUSION**

4 The Court determines that the Defendant's ineffective-assistance  
5 of counsel claim fails because the Defendant cannot show his  
6 counsel's performance was objectively unreasonable. Further,  
7 Defendant has not demonstrated he was prejudiced by his counsel's  
8 alleged deficiencies. He has not shown a reasonable probability that  
9 but for his counsel's alleged errors, he would have exercised his  
10 right to trial by jury, *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct.  
11 366, 370, 88 L.Ed.2d 203 (1985), or that his sentence would have been  
12 different. Moreover, the Court determines an evidentiary hearing is  
13 not necessary because the Defendant's claim of ineffective assistance  
14 of counsel does not state adequate grounds for relief even if the  
15 Court assumes the truth of Defendant's claims. *Baumann v. United*  
16 *States*, 692 F.2d 565, 571 (9th Cir. 1982). Accordingly,

17 **IT IS HEREBY ORDERED:**

18 1. The Defendant's § 2255 Motion to Vacate, **Ct. Rec. 52**, is  
19 **DENIED.**

20 **IT IS SO ORDERED.** The District Court Executive is hereby  
21 directed to enter this Order and furnish copies to counsel and to the  
22 **Defendant.**

23 **DATED** this 7th day of December, 2005.

24  
25 s/ Fred Van Sickle  
Fred Van Sickle  
United States District Judge  
26